FILE COPY

FEB 19 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY
Appellants,

vs.

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,
Appellees.

BRIEF FOR APPELLEES

H. C. HUGHES,
JOHN NEETHE,
JOHN L. DARROUZET,
Counsel for Appellees.

INDEX

Page

PRELIMINARY STATEMENT 1– 2

POINT ONE 2

"This Court has no jurisdiction to revise the questions passed on by the Supreme Court of Texas."

(a) Discussion of Assignments of Error..... 2– 4
(b) The courts of each State have the right to construe contracts without control by this court..... 4– 5
(c) Limitation laws are controlled by the laws of several states 5– 7
(d) Discussion of public policy and police power..... 7–13

POINT TWO 12

As the Federal Constitution has no extra-territorial effect, it will not protect foreign contracts, and particularly is this true when they are in direct conflict with the law of the State of the forum where they are sought to be enforced.

(a) Extraterritorial effect of laws 12–13
(b) Situs of personal and movable property.....13–14
(c) Territorial effect of the Constitution 14–16
(d) Effect of the situs of this contract upon its construction 16–19

POINT THREE 19

The contractual provision was purely a clause of limitation and applied to the remedy only. In any event the State courts had a right to so construe the contract.

POINT FOUR 19

Even if it should be held that the provision in reference to limitation was a substantive part of the contract, yet such provision is in direct contravention to the policy of the State of Texas, as declared by its laws and the decisions thereunder, and the courts of

Page

Texas will not be compelled to enforce any law that is against the public policy of the State.

(a) The one-year limitation in the contract related to the remedy 19–20

(b) In any event it must yield to the public policy and police power of the State 20–23

POINT FIVE 23

The Appellants have been accorded due process of law in the courts of Texas.

POINT SIX 25

The judgment of the courts of Texas against the American insurance companies as garnishees was rendered in full compliance with its law and jurisdiction properly and lawfully acquired over the American insurance companies, because immediately upon the total loss of the vessel a debt accrued from the re-insurance companies to the Mexican company and this debt the Appellee had a right to subject to his claim for garnishment in accordance with the laws of the State.

(a) Relevancy of cases cited by Appellants 25–26

(b) The rule laid down in this case is no radical departure from the construction of like statutes in other jurisdictions 27–28

(c) Jurisdiction in the State court 28–29

(d) Garnishment laws of Texas are liberal 29–30

(e) General discussion of garnishment 30–33

CONCLUSION 33

TABLE OF CASES.

Page

A.

Aetna Life Insurance Company vs. Tremblay, 223 U. S. 185, 56 L. Ed. 398 15
Alexander vs. Burnett, 39 S. C. L. 189 16
Allemania Fire Insurance Co. vs. Firemen's Insurance Company, 209 U. S. 326, 52 L. Ed. 815 29
American Banana Company vs. United Fruit Co., 213 U. S. 353, 355, 53 L. Ed. 825 15
Armstrong vs. G. H. & S. A. Ry. Co., 92 Tex. 121..... 26
Atchison, Topeka & S. F. Ry. Co. vs. Mills, 53 Tex. Civ. Apps. 359, 116 S. W. 852 16

B.

Balkam vs. Iron Co., 154 U. S. 177-190; 38 L. Ed. 953..... 6
Banco Minero vs. Ross, 172 S. W. R. 711 28
Berry vs. Davis, 77 Tex. 191 32
Bond vs. Hume, 243 U. S. 21-23, 61 L. Ed. 569..... 7
Buhl vs. Stephens, 84 Fed. 922 20
Burnet vs. Desmornes y Alvarez, 226 U. S. 143, 57 L. Ed. 159 6

C.

Canadian Pac. Ry. Co. vs. Johnston, 61 Fed. 738, 9 C. C. A. 587 16-17
Cass County vs. Mercantile Town Mutual Ins. Co., 188 Mo. 1, 86 S. W. R. 237 32
Central Land Company vs. Laidley, 159 U. S. 103-112, 40 L. Ed. 91 4
Chapin vs. Fye, 179 U. S. 126, 45 L. Ed. 119 3
Chicago, R. I. & P. R. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797 14-32
Chicago & A. Ry. Co. vs. Transbarger, 238 U. S. 70-77..... 22
Chicago Life Insurance Co vs. Cherry, 244 U. S. 28-30..... 28
Commercial National Bank vs. Davidson, 18 Oregon 57, 22 Pac. 517 20
Consolidated Real Estate Ins. Co. vs. Cashow, 41 Md. 59-78 32
Corrigan vs. Buckley, 271 U. S. 327, 70 L. Ed. 969 4-23
Cunard Steamship Co. vs. Mellon, 262 U. S. 119, 67 L. Ed. 894 15

Page

E.

Equitable Life Assurance Society vs. Brown, 180 U. S. 311, 47 L. Ed. 190 3
Eubank vs. Richmond, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B 192 9

F.

Finnel vs. Southern Kansas Ry. Co., 33 Fed. 427 16

G.

Green vs. Van Buskirk, 72 U. S. 307, 18 L. Ed. 601..... 8
Galliher vs. State Mutual Life Insurance Company, 150 Ala. 543, 124 Am. St. Rep. 82..... 27
Gorden et al vs. Litwood Oil & Supply Co., 261 S. W. 400.. 30
Grannis vs. Ordean, 234 U. S. 386, 58 L. Ed. 1368-9..... 24

H.

Harding vs. Illinois, 196 U. S. 82-88, 49 L. Ed. 395..... 28
Hawkins vs. Barney, 5 Pet. 457 5
Hamilton vs. Schoenberger, 47 Iowa 385-7 20
Hicks vs. Poe, 269 U. S. 118-121, 70 L. Ed. 187.....29-32
Hornick vs. First Catholic Slovak Union, 115 Kan. 597, 224 Pac. 486 27
Huber vs. Steiner, 2 Bing (N. C.) 202, 29 E. C. L. 501, 132 Reprint 80 16

J.

Jones vs. Buffalo Coal and Coke Company, 245 U. S. 328, 61 L. Ed. 325 24
Jordan vs. Massachusetts, 225 U. S. 174, 56 L. Ed. 1041..... 23

K.

Kensington, The, 183 U. S. 269, 46 L. Ed. 190 8
King vs. Cross, 175 U. S. 398, 401, 44 L. Ed. 213.....13-32

L.

Lancashire Insurance Company vs. Corbetts, 165 Ill. 592, 36 L. R. A. 640 14
League vs. Young, 11 How. 185, 13 L. Ed. 657..... 15
Lehigh Water Company vs. Easton, 121 U. S. 388, 30 L. Ed. 1059 4
Louisiana & W. Ry. Co. vs. Gardiner, 273 U. S. 281, 71 L. Ed. 644 6

Page

M.

Manigault vs. Springs, 199 U. S. 473, 50 L. Ed. 274 21
Meacham vs. Jamestown, Etc., Ry. Co., 211 N. Y. 346, Ann. Cas. 1915-C 853 8
M. K. & T. Ry. vs. Harris, 234 U. S. 415, 58 L. Ed. 1377 11
Moores vs. Winter, 67 Ark. 189, 53 S. W. 1057 16
McElmoyle vs. Cohen, 13 Pet. 312, at 326 6

N.

New York ex rel vs. Kleinhart, 268 U. S. 647, 69 L. Ed. 1135 3

O.

Ogden vs. Saunders, 12 Wheat 213, 255 14

P.

Penfield vs. C. O. & S. W. Ry. Co., 134 U. S. 351, 33 L. Ed. 940 16
Pennsylvania Ry. Company vs. Hughes, 191 U. S. 484, 48 L. Ed. 270 11-26
Pierce vs. Somerset Ry. Co., 171 U. S. 648, 43 L. Ed. 316 30
Pierce Oil Co. vs. Phoenix Refining Co., 259 U. S. 125, 66 L. Ed. 855 28
Phoenix Insurance Company of Brooklyn vs. P. J. Willis Bros., 70 Tex. 12 29

R.

Rantuol vs. Claremont Paper Company (C. C. A.) 196 Fed. 305 20
Red Cross Line vs. Atlantic Fruit Co., 264 U. S. 109, 68 L. Ed. 582 8-20
Remington Paper Co. vs. Watson, 173 U. S. 443, 43 L. Ed. 762 24
Richmond & A. R. Co. vs. R. A. Patterson Tobacco Co., 169 U. S. 313-315, 42 L. Ed. 761 10

S.

Sawyer vs Piper, 189 U. S. 154, 47 L. Ed. 157 3
Simon vs. Craft, 182 U. S. 431-6, 45 L. Ed. 1166 24
Sligh vs. Kirkwood, 237 U. S. 59-61, 59 L. Ed. 838 9-23
Smith vs. Union Bank, 5 Pet. 525, 8 L. Ed. 215 8
Smith vs. Webb (Tex. Civ. Apps.), 181 S. W. 820 16

Page

Smith vs. Northern Neck Mt. F. Ass'n, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1019 20-27

Straesser-Arnold Co. vs. Franklin Sugar Company (C. C. A.) 8 Fed. (2) 601 20

Standard Oil Co. vs. Marysville, 279 U. S. 582, 73 L. Ed. 857 22

South and Central American Commercial Company vs. Panama R. Co., 237 N. Y. 287, 142 N. E. 666 23-27

Semmes vs. City Fire Ins. Co. of Hartford, 80 U. S. 531-568, 20 L. Ed. 491 26

Stone vs. Mississippi, 101 U. S. 814-821, 25 L. Ed. 1079 10

T.

Travelers Insurance Company vs. Suggs, 71 Texas 579 26

U.

Union Trust Co. vs. Grosman, 245 U. S. 412, 62 L. Ed. 368 .. 21

W.

Walworth vs. Harris, 129 U. S. 355, 32 L. Ed. 712 21

Waters-Pierce Oil Company vs. Texas, 212 U. S. 113, 53 L. Ed. 431 3-5

Walker vs. Sauvinet, 92 U. S. 90-92, 23 L. Ed. 678 24

Western Union Telegraph Co. vs. Commercial Milling Co., 218 U. S. 413, 421, 54 L. Ed. 1088 10

Y.

York vs. State of Texas, 137 U. S. 15-21, 34 L. Ed. 607 25

7 Cooley's Brief on Law of Insurance, 1673 29

5 Joyce on Insurance, par. 3224 29

14 Ruling Case Law, 1418, par. 580 27

13 C. J. 260 27

49 U. S. C. A. p. 75, Sec. 20, par. 11 30

12 R. C. L. 804 31-32

5 R. C. L. 944 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 232

THE HOME INSURANCE COMPANY and FRANKLIN FIRE INSURANCE COMPANY

Appellants,

vs.

C. J. DICK, TEXAS AND GULF STEAMSHIP COMPANY and SUDERMAN & YOUNG, INC.,

Appellees.

BRIEF FOR APPELLEES

TO THE SUPREME COURT OF THE UNITED STATES:

The appellees desire to enlarge herein to some extent on what has been said in their "Answer to Appellant's Statement as to Jurisdiction" and in the "Answer to the petition for Writ of Certiorari" and will further undertake to point out why this cause should be affirmed, even if this court should decide that it has jurisdiction to pass on the questions involved.

To the statement of the case made by appellants, and commencing on page 3 of their brief the facts should be added: that C. J. Dick at all times was a resident and citizen of the State of Texas and of the United States. He returned from Mexico to Texas about two weeks after the loss covered by the policies of insurance occurred (Rec. 10). The re-insurance companies accepted reinsurance of

$15,000.00 each, absolutely and without condition (Rec. 40). The question of fact that the vessel was totally destroyed was found by the trial court and affirmed by the Court of Civil Appeals and is, therefore, conclusive in all other appellate proceedings. There is nothing in the policy which fixes the place of payment except the fact that it was made and delivered in Mexico. The ownership and situs of the entire claim against the Mexican Insurance Company has been at all times located in Galveston, Texas, at least since the time that C. J. Dick returned from his temporary visit in Mexico (Rec. 10). The interveners also resided in Texas and the policy of Insurance was payable to the Texas & Gulf Steamship Company of Galveston, Texas, as its interest might appear (Rec. 38-39).

POINT ONE.

This Court has no jurisdiction to revise the questions passed on by the Supreme Court of Texas.

The appellants did not raise the federal questions suggested in the trial court at all. They did not assign such questions as error on their appeal from the District Court of Galveston County to the Court of Civil Appeals. (Rec. 28-31). The federal question was brought into the Court of Civil Appeals by the brief and not by the assignments of error. This indicates how fully and fairly all questions were considered by the Appellate Courts of Texas, even though not assigned. Two federal questions only were attempted to be raised in the court below. These were:

(1) That Article 5545 of the Revised Statutes of the State of Texas, (1925), set out in appellant's statement, as applied to the contract of insurance sued on is unconstitutional and in violation of Article 1, Section 10, clause one of the Federal Constitution.

(2) Did application of said statute deprive appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution?

These questions were raised by five different assignments of error in the Supreme Court of Texas, all of them, however, being of the same purport (Rec. 91-92). In this court, additional assignments have been suggested, and which raise questions, never heretofore assigned as error arising under the Constitution of the United States in the courts below (Rec. 93-96). Such questions can not be considered in this court. The assignments of error filed in this court can not bring into the record any new matter for consideration which was not suggested as a federal question in the courts below. Waters-Pierce Oil Company vs. Texas, 212 U. S. 113, 53 L. Ed. 431. No other federal questions having been suggested or assigned in the lower courts other than those pointed out hereinabove as having been raised in the Supreme Court of Texas, therefore, such newly assigned questions will not be considered by this court. Chapin vs. Fye, 179 U. S. 126, 45 L. Ed. 119; Sawyer vs. Piper, 189 U. S. 154, 47 L. Ed. 157; Equitable Life Assurance Society vs. Brown, 180 U. S. 311, 47 L. Ed. 190. Under such circumstances it will become necessary for this court to determine whether under the assignments as made in the lower courts, it has any jurisdiction whatever to pass upon the questions raised.

"It is well settled that this court is without jurisdiction to review the judgment of a State Court on a writ of error by reason of a federal question which was not raised below or called to the attention of, or decided by the State Court." New York ex rel, vs. Kleinert, 268 U. S. 647, 69 L. Ed. 1135.

The appellants and petitioners in this case seem to have lost sight of the fact that this is a case from the Supreme Court of Texas, wherein the public policy of the

State of Texas was determined. They have briefed the case as if it was a general appeal, bringing up all questions to this court for final determination. The only questions which this court will examine into in such a case are whether or not there are federal questions which were properly assigned and in which in fact raise substantial questions arising under the laws and constitution of the United States. Corrigan vs. Buckley 271 U. S. 327, 70 L. Ed. 969. This court has no authority to examine into mere errors, if such there be, in the judgment of the Supreme Court of Texas. That court may hold a contract void, which this court might think valid, or might render a contrary holding. In respect to such things this court has no authority to interfere.

"It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decision, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary * * * The State Court * * * may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong." Still this court has no authority to revise the judgment of the State Court. Central Land Company v. Laidley, 159 U. S. 103-112, 40 L. Ed. 91.

This rule has been reiterated many times, See Lehigh Water Company vs. Easton, 121 U. S. 388, 30 L. Ed. 1059, where this court said:

"The argument in behalf of the Company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may re-examine the judgment of the State court in every case involving the enforcement of contracts. But this view is unsound."

It then followed the statement just quoted with the language herein copied from the Laidley case. And also cites many other cases laying down the same rule.

The situation with respect to this appeal is quite like that in Waters-Pierce Oil Company vs. Texas, 212 U. S. 87-97, where this court uses the following language:

"The case was submitted upon oral arguments and elaborate briefs and voluminous record. It was argued, in many aspects, as though this was a proceeding in error to review the weight of the evidence adduced in the state courts, to re-examine the rulings of the court upon the admissibility of testimony, and to **determine the effect of the statute of limitations in the state.**

and again, on page 111, of the same volume, and in the same case:

"And it is to be remembered that we are dealing with an act of the legislature, sustained in courts of the state, with reference to its validity in view of the prohibitions of the federal Constitution against deprivation of state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the state, the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

If the Supreme Court of Texas had a right, as herein shown, to construe a provision in a contract as invalid and did so after a full hearing, then we are wholly unable to see how there could be any question of due process in this case. Since the early case of Hawkins vs. Barney, 5 Pet. 457, it has been held that "laws limiting the time of bring-

ing suit constitute a part of the lex fori of every country. They are laws of administering justice; one of the most sacred and important of sovereign rights and duties." This court has also said in McElmoyle vs. Cohen, 13 Pet. 312 at 326, "it would be strange if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it would be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts."

"Now laws of the several states have been more steadfastly or more often recognized by this court, from the beginning as rules of decision in the courts of the United States, than statutes of limitations as enacted by the legislature of a state and construed by its highest court." Balkam vs. Iron Co., 145 U. S. 177-190; 38 L. Ed. 953.

Only a few months ago this court announced the following rule:

"Here although the rights of the parties depended upon instruments the meaning and effect of which must be determined according to rules approved by the federal courts, there was no federal statute of limitation and the local one applied." Louisiana & W. Ry. Co. v. Gardiner, 273 U. S. 281, 71 L. Ed. 644.

There is no such situation here, as the rights of the parties do not depend upon matters governed by federal law and therefore clearer reason for applying the local statute. In Burnet vs. Desmornes y Alvarez, 226 U. S. 143, 57 L. Ed. 159, this court said:

"Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense. When a court has general jurisdiction to try the question whether an alleged right exists, the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power."

If the courts of Texas had jurisdiction and power to try the issue of the effect of the agreed limitation then their

judgment, even if it were wrong, could be nothing more than error over which this court has no control.

If the foregoing correctly states the law, then it is clear that this case has been passed upon by the Supreme Court of Texas on a question well within its rights and that court has held a provision in a foreign contract, that is a contract made and delivered in the Republic of Mexico, void, as being contrary to the police power, public policy and mode of practice prescribed by the statutes of the State of Texas and as such questions have been construed by its highest courts. It will be noted that appellants in their third assignment in this court refer to Article 5545 as "being a state statute of limitation of general scope." (Rec. 94).

The only theory suggested by which it could be asserted that this contract was enforceable as written, is one of comity, but comity must yield when a contract is contrary to the public policy of the state where it is sought to be enforced.

"And finally, it is certain that, as it is peculiarly within the province of the law-making power to define the public policy of the state, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted. It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain, and exact a greater degrees of respect for each other than otherwise by the principles of comity would be expected." Bond vs. Hume, 243 U. S. 21-23, 61 L. Ed. 569.

"This principle is, that where the lex loci contractus and the lex fori as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land." Green vs. Van Buskirk, 72 U. S. 307, 18 L. Ed. 601. "The obligation of the sovereign to enforce his own law and to protect his own subjects is acknowledged to be paramount." Smith vs. Union Bank, 5 Pet. 525, 8 L. Ed. 215.

This court has also said in The Kensington, 183 U. S. 269, 46 L. Ed. 190:

"To state the proposition is, we think, to answer it. It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."

A very apt statement of the law on this subject has also been made by the Court of Appeals for the State of New York, as follows:

"Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts (authorities cited) shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state." Meacham vs. Jamestown, Etc., Ry. Co., 211 N. Y. 346, Ann. Cas. 1915-C, 853.

The last named case was cited with approval by this court in Red Cross Line vs. Atlantic Fruit Company, 264 U. S. 109, 68 L. Ed. 582.

The Supreme Court of Texas held that the provision in the insurance policy sued on was in contravention of the public policy of Texas and void. They had a right to make such holding. The statute of Texas had been in effect many years, is a well recognized part of the procedure of the State and has been construed and upheld by the highest courts in Texas as applying to foreign contracts.

With reference to the police power and what comes within its domain, this court has said:

"The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barkler vs. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524, 42 L. Ed. 260, 262, 17 Sup. Ct. Rep. 864. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. In one of the latest utterances of this court upon the subject it was said 'whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible to circumstantial precision. It extends, we have said not only to regulations which promote the public health, morals and safety, but to those which promote the **public convenience or the general prosperity.**— And further "It is the most essential of powers, at times the most insistent, and **always one of the least limitable of the powers of government.**' " Eubank vs. Richmond, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914 B, 192, Sligh vs. Kirkwood, 237 U. S. 59-61, 59 L. Ed. 838.

"Chief Justice Marshall when he announced the opinion of the court (In Dartmouth College vs. Woodward),

was careful to say (page 629) that the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." Cited from Stone vs. Mississippi, 101 U. S. 814-521, 25 L. Ed. 1079.

The state police power can even be exerted over matters about which Congress has a right to legislate, so long as the Federal law-making power has left the field unoccupied. State statutes which have a tendency to regulate interstate commerce have been upheld as a proper exercise of police power of the State, particularly with respect to questions of procedure.

"Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce." Richmond & A. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 313-316, 42 L. Ed. 761.

In fact, in the case of Western Union Telegraph Co. v. Commercial Milling, 218 U. S. 413, 421, 54 L. Ed. 1088, this court sustained a statute of the State of Michigan with reference to a telegraph message between Detroit and Kansas City when the statute rendered void any limitation of the common law liability of the telegraph company. The case was one arising under the Constitution and laws of the United States and the Michigan Statute was sustained on the theory that said statute was a proper exercise of the police power of said state and that the limitation as to recovery in the contract was void when viewed in the light of the said statute and when being construed by the courts of that state. This court said in affirming the judgment of the Supreme Court of Michigan:

"By the law of the State, the stipulation is of no force and effect. The court so declared. It is contended here that in so doing the court was in error. It will be well to have in mind the effect of the statute as it was applied by the trial court. Undoubtedly, it was the application of a local law to the contract, but the local law does not attempt to state, measure or to establish any duty of the defendant, or to establish, define, or fix the consequences of the miscarriage. The liability, of the defendant, is established without reference to the statute. It is when it asks to be relieved therefrom, by giving effect to the stipulation, that the local law becomes, if at all, effective."

We likewise refer to the case of the Pennsylvania Ry. Company vs. Hughes, 191 U. S. 484, 48 L. Ed. 270, where this court uses the following language:

"So long as Congress has not legislated upon the particular subject, they (The statutes of the several states) are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State."

A case illustrative of how careful this court has been in upholding the rights of the states, particularly in regard to police power and questions of procedure in the State courts, is that of M. K. & T. Ry. vs. Harris, 234 U. S. 415, 58 L. Ed. 1377.

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power,—is not to be set aside as inconsistent with an Act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In Reid vs. Colorado, 187 U. S. 137, 148, 47 L. Ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: 'It should never be held that Congress intends to super-

sede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.' This court has said—and the principle has been often reaffirmed —that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' "

Thus, we deem it proper to call the attention of the court to the fact that appellants do not claim that the situation in hand is controlled by any law of Congress, or that any federal statute has been violated, but their claim seems to be that because the clause in the contract was valid in Mexico that it is a violation of the Constitution of the United States because it is unenforceable in Texas, even though it has been expressly held by the Supreme Court of Texas to be against the public policy of that State.

We respectfully ask the court to consider in this connection appellees' "Answer to Statement as to Jurisdiction" heretofore filed. To embody same in this brief would unduly lengthen it.

POINT TWO.

As the Federal Constitution has no extraterritorial effect, it will not protect foreign contracts, and particularly is this true when they are in direct conflict with the law of the state of the forum where they are sought to be enforced.

On page 29 of the brief for appellants, the following language is used:

"Both of the Texas appellate courts have construed Article 5545, Revised Civil Statutes, 1925, as providing for extraterritorial operation and effect. Both of said courts have then held that the statute so construed, is constitutional."

We think that the appellants have misconstrued the decisions of both the appellate courts of Texas, which affirmed the judgment of the District Court on this case. They do not and have not held that Article 5545 of the Revised Civil Statutes of the State of Texas has any extraterritorial effect. The holding, however, is that when a suit is brought on a foreign contract in the Texas courts and when the Texas courts have acquired jurisdiction of the parties and the cause of action, the contract and its effect are then subject to the laws of Texas and are to be construed at least as to all questions of remedy and procedure in accordance with the statutes, and rules of procedure of that state. The matter is then not extraterritorial but becomes under such circumstances "territorial," if we may so use the word. If a contract or any provision of a foreign contract is contrary to the public policy or the statutes of the State of Texas governing procedure, such provisions will be held invalid and the contract construed as if no such provision existed. The appellants also seem to lose sight of the fact that the limitation in the contract had not expired when the appellee, C. J. Dick, returned to Texas; they also lose sight of the fact that the policy of insurance was payable to the Texas & Gulf Steamship Company, as its interest might appear (Rec. 38-39) and any such interest as the Texas & Gulf Steamship Company and C. J. Dick had, certainly arose in Texas and during the time that the policy was in full force and effect. This clearly indicates that the Mexican Company contemplated the payment in Texas of any sums that might be due, to said Texas & Gulf Steamship Company. The claim or cause of action was personal property and accompanied the appellee, Dick, to Texas.

With reference to situs of personal and movable property and claims against others, this court has held in King vs. Cross, 175 U. S. 398-401, 44 L. Ed. 213; as follows:

"The situs of movable property is at the domicile of the owner of such property, and therefore the situs of the claim or credit held by the Massachusetts firm against the Lippitt Woolen Company was not in Rhode Island, where the Lippitt Woolen Company was resident, but was in Massachusetts, where the creditor firm was established. The contention in substance is that any process of foreign attachment predicated upon the assumed right to levy on debts due to nonresidents by persons within the state wherein the process issues is absolutely void, hence a denial of due process of law.

We need not enter into a review of the contentions thus presented, since they were all considered by this court at its last term and held to be untenable. Chicago, R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797."

"Now it is the generally accepted doctrine that, so far as so intangible a thing as a debt can be held to have a situs, it follows the creditor or owner of the credit and is at his domicile." Lancashire Insurance Company vs. Corbetts, 165 Ill. 592, 36 L. R. A. 640.

Appellee Dick had a right to bring the suit in Texas, if jurisdiction could be secured, according to the limitation and methods of practice as provided by the courts of Texas. Jurisdiction of the parties was secured. The question of jurisdiction was decided by the courts of Texas and was not assigned in the Texas courts as a federal question.

If the dissenting opinion of Mr. Justice Washington in Ogden vs. Saunders, 12 Wheat 213, 255, cited by appellants, holds what they contend for, and should be of any effect whatever, it would still be very far from holding that the obligation of a contract made in a foreign country is protected by the Constitution of the United States. He was there referring to contracts made within the United States but in states foreign to each other in the sense of separate states. It will be noted in Munday vs. Wisconsin Trust Company, 252 U. S. 501-503, 64 L. Ed. 686, this court

speaking through Mr. Justice McReynolds held that statutes of Wisconsin in force when contracts were made in Illinois and which invalidated said contracts did not run counter to the contract or due process clauses in the Constitution.

The laws and Constitution of the United States do not have any extraterritorial effect. American Banana Company vs. United Fruit Company, 213 U. S. 353, 355, 53 L. Ed. 826. The contention made by the appellants in all of the Texas courts and in this court, that the contract was valid and governed by the law of Mexico, certainly is, in itself, a denial of their position that the Constitution of the United States protects the obligation of the contract sued on. A judgment obtained in a foreign country does not have the guaranty of the Constitution of the United States and is not protected by that instrument. Aetna Life Insurance Company vs. Tremblay, 223 U. S. 185, 56 L. Ed. 398. The effect of the legislation of a foreign country is not guaranteed by the Constitution of the United States. League vs. Young, 11 How. 185, 13 L. Ed. 657. On numerous occasions contracts of seamen have been held invalid when a foreign ship comes into our territory and so long as the foreign ship remains in our territory, even though such contracts are absolutely valid and binding where made. The reason is that when they come under the influence of our laws the comity accorded to such contracts must yield and our own laws become effective. Practically the same rule is laid down in Cunard Steamship Co. vs. Mellon, 262 U. S. 119, 67 L. Ed. 894. So in the case at bar, C. J. Dick, a citizen of Texas, left Mexico shortly after the fire causing his loss, (Rec. 10), and came to Texas where he has always resided except for his temporary absence in Mexico. The situs of his claim against the Mexican Insurance Company followed him to Texas and the laws of Texas had the im-

mediate effect of rendering the clause, relied upon by the appellants, void long before the policy would have been barred by limitation even by the law of Mexico.

Under such circumstances this court has held as follows:

"If he (the plaintiff) had, before the expiration of the period limited by the law of Tennessee quitted his residence in Missouri and joined his family in New York for the purpose of making the latter state his residence in fact, he would have been entitled to bring his action within the period fixed by the laws of New York for the commencement of actions like this by one who is a resident of that state when the cause of action accrues." Penfield vs. C. O. & S. W. Ry. Co., 134 U. S. 351, 33 L. Ed. 940.

The same rule has been laid down in the following cases: Atchison, Topeka & S. F. Ry. vs. Mills, 53 Tex. Civ. Apps. 359; 116 S. W. 852; Smith vs. Webb (Tex. Civ. Apps.) 181 S. W. 820; Canadian Pac. Ry. Co. v. Johnston, 61 Fed. 738, 9 C. C. A. 587; Finnel vs. Southern Kansas Ry. Co., 33 Fed. 427; Moores vs. Winter, 67 Ark. 189, 53 S. W. 1057; Alexander vs. Burnett, 39 S. C. L. 189; Huber vs. Steiner, 2 Bing. (N. C.) 202, 29 E. C. L. 501, 132 Reprint 80. On this question the Supreme Court of Texas followed the above cases. Its opinion on this subject is as follows:

"However, even if it should be held that there is a distinction to be drawn between a prescriptive statute that kills the cause of action, and a statute of limitation that merely bars the right of recovery by limitation where limitation is pleaded, still in this case the result would be the same as it is shown that Dick removed from Mexico a few days after the boat in question was destroyed, and has lived in Texas ever since. Under such circumstances a prescriptive statute of Mexico would be no defense in the courts of Texas. 37 C. J. 732, Sec. 50, and notes; Ry. Co. v. Mills, 116 S. W. 853, (Civ. App. writ ref'd.) * * *

Of course, had both parties remained in the Republic of Mexico until the bar of the statutes of that country had actually and fully operated, a different question would be presented; and, under the rule that where personal property is held adversely in one state for a sufficient length of time to acquire title thereto by prescription or limitation, such title will be recognized in other states, it might be that, under the statutes of Mexico, and the contract in question, this cause would be barred in Texas, 37 C. J. 732, Sec. 50. No such question is presented in this case." (Rec. 80-81.)

That the same rule applies to contracts as well as in torts is shown in Canadian Pac. Ry. Co. v. Johnston, supra, where Judge Shipman, of the Second Circuit considers this matter quite fully. He sets out on page 742 (Fed. Rp. 61) the code of Canada:

"Art. 2262. The following actions are prescribed in one year: For slander or libel, reckoned from the day it came to the knowledge of the party aggrieved. For bodily injuries, saving the special provisions contained in Article 1056, and cases regulated by special laws."

"Art. 2267. In all cases mentioned in articles 2250, 2260, 2261 and 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

The Canadian statute is much more a statute of extinguishment than either the Mexican Statute or the agreed limitation clause relied on by appellants.

In discussing this question, on page 745, it is said:

"No testimony was given in regard to the construction of the statute by the Canadian courts, and we have not found a controlling authority in the decisions of other courts, as to the construction of statutes, which use similar language. The statute purports to be one of extinguishment, but the prescription may be interrupted by acknowledgement on the part of the possessor or debtor, or the debt or claim may be revived after the prescription

has run. The argument, therefore, is that, if the debt may be revived, after the full time of prescription has elapsed, the statute is not one of extinguishment. This suggestion does not meet the question, which, it is true, does not arise in this case but which often may arise, and which is, what is the effect of the statute, when pleaded and shown, in an action in a foreign country, upon a debt due from a citizen of Canada to a citizen in Canada, when the time of prescription has run before suit, without interruption, while both parties resided in Canada, and the debt has never been revived? In the case of Bulger v. Roche, supra, the debt was contracted between subjects of Novia Scotia, who remained there until the debt was extinguished by virtue of its statute of limitations; but, in the opinion of Chief Justice Shaw, the statute created no legal defense to an action by the creditor in the state of Massachusetts. The court treated the question as one arising under an ordinary statute of limitations, which merely affected the remedy. But without attempting to pass upon what may be the effect of the statute under all circumstances, it is sufficient to say that, assuming that it possesses its largest character, and is a statute of extinguishment, it constitutes no defense to the suit of this plaintiff in the State of Vermont, because during the plaintiff's residence in Canada, it has not become operative, and had not extinguished the debt, so far as courts in states foreign to Canada are concerned. The injury happened on Sept. 6, 1890. The plaintiff was at that time a citizen of Vermont, but after the injury, he remained in Canada until April, 1891, when he returned to his mother's and his own home, in Vermont and remained there continuously thereafter. When, before a statute of limitations has become operative, by way of extinguishment of the debt, as between two citizens or residents of a state, one of the parties has permanently changed his national domicile, and become a citizen of a foreign state, the statute will not become an absolute bar, as an extinguishment in the courts of such foreign state. It cannot become, in the country to which he has removed, an absolute extinguishment, unless the parties resided in the country of the statute during the whole period of limita-

tion. Wood, Lim. Act. 22. The reasoning which leads to this result is stated by Judge Story in his Conflict of Laws (Sec. 582)."

As the citation from Judge Story's work following the foregoing is very lengthy and may be found in full on page 746 of Judge Shipman's opinion, we do not desire to burden this brief by copying it herein.

POINT THREE

The contractual provision was purely a clause of limitation and applied to the remedy only. In any event the State Courts had a right to so construe the contract.

(See authorities and argument under following point.)

POINT FOUR

Even if it should be held that the provision in reference to limitation was a substantive part of the contract, yet such provision is in direct contravention to the policy of the State of Texas, as declared by its laws and the decisions thereunder, and the courts of Texas will not be compelled to enforce any law that is against the public policy of the state.

The clause relied on in the contract providing that suit must be brought within one year, pertained exclusively to the remedy. It had nothing to do with the substance of the Contract, had no reference to the principal subject in hand and came into use only in the event that a loss occurred and suit should be filed. The Supreme Court of Appeals in Virginia on the same question held as follows:

"If, therefore, we were dealing with a case of limitation by statute, we should deem the authorities already cited as conclusive upon the subject. Is there any essen-

tial difference between a limitation imposed by statute, and that which is imposed in a stipulation entered into by the parties? Undoubtedly, the object and effect are the same, and the one as well as the other operates only upon the remedy. A contract entered into is presumed to be made with reference to existing laws, and yet it is well established that those laws may be altered, amended, or repealed without affecting the binding force of the contract, so long as a sufficient remedy is left for its enforcement." Smith vs. Northen Neck Mt. F. Ass'n., 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1019.

Matters of this character, therefore, have reference to the remedy only. Arbitration clauses have been held to be remedial by this Court. Red Cross Line vs. Atlantic Fruit Company, 264 U. S. 109, 68 L. Ed. 582. The statutes of frauds relate to the remedy and the lex fori controls. Rantoul vs. Claremont Paper Company, (C. C. A.) 196 Fed. 305; Buhl vs. Stephens, 84 Fed. 922; Straesser-Arnold Co. v. Franklin Sugar Company (C. C. A.) 8 Fed. (2) 601. "A confession of judgment pertains to the remedy. A person seeking to enforce here a contract made in another state must do so in accordance with the laws of this state. Parties can not, by contract made in another state, engraft upon our procedure here remedies which our laws do not contemplate or authorize." Hamilton vs. Schoenberger, 47 Iowa 385-7. Likewise it has been held that remedies on auxiliary agreements, the obligation of which does not arise until the remedy is sought upon the contract, are to be governed by the law of the forum. Commercial National Bank vs. Davidson, 18 Oregon, 57, 22 Pac. 517. The Supreme Court of Texas had a right under the authorities to hold as it did that the clause with reference to suit being brought within one year was not a substantive part of the contract, but pertained only to the remedy. But, granting for the sake of argument that the one-year clause in question might be construed by

this court as a substantive part of said contract and not one pertaining to the remedy only, still this court would not require its enforcement even if the question were one originally tried in the federal courts, because said clause is in violation of the public policy of Texas. Union Trust Company vs. Grosman, 245 U. S. 412, 62 L. Ed. 368. In that case a contract valid under the laws of Illinois where made was refused enforcement in the federal courts of Texas and this court as to Mrs. Grosman because it was contrary to the public policy of Texas. This court holding that though the contract was valid where made, nevertheless it must yield to the public policy of Texas.

The Supreme Court was well within its rights in construing the limitation clause as a part of the remedy even if this court would have held differently. That court was construing the contract in connection with a State statute and was passing on the effect of the state statute upon the contract. They, of course, held valid their own "statute of limitation of general scope" and also held that the clause in the contract was invalidated thereby.

"Every nation • • • has (as has often been said) a right to protect itself and its citizens against the inequality of foreign laws which are injurious to their interests." Walworth vs. Harris, 129 U. S. 355, 32 L. Ed. 712.

The settled rule of this court is well expressed in Manigault vs. Springs, 199 U. S. 473, 50 L. Ed. 274, as follows:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be effected. This power, which, in its various ramifications, is known as the police power, is an exercise

of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

"We may not test in the balance of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body." Standard Oil Co. vs. Marysville, 279 U. S. 582, 73 L. Ed. 857.

"It is well established by repeated decisions of this court that neither of these provisions (due process and cantract clauses) of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety or general welfare of the community." Chicago & A. Ry. Co. v. Transbarger, 238 U. S. 70-77.

In other words, the public policy and police power of the several states are supreme unless they run counter to some question over which Congress has exclusive control, and in that case even, as hereinbefore shown, this court will look with considerable solicitude upon the question before overturning a decision of the State based upon such power.

The following general rule is laid down in 5 R. C. L. 944:

"The public policy of a State, established either by express legislative enactment, or by the decisions of its courts, is supreme, and when once established will not, as a rule, be relaxed even on grounds of comity to enforce contracts, which, though valid where made, contravene such policy."

This doctrine is supported by decisions from practically every state in the Union.

We believe about the best illustration we can give that a federal question is not necessarily involved in this case is to call attention to the fact that the Court of Ap-

peals of New York decided that short and unreasonable stipulations in foreign bills of lading as to time for bringing suit were void as contrary to the public policy of that state. South and Central American Commercial Company vs. Panama Ry. Co., 237 N. Y. 287, 142 N. E. 666. This conclusion was not based on a statute. In our case the decision was based on a statute. In each case the effect was the same. Each was declaring the public policy of the State, each was doing something within its police power, "one of the least limitable of the powers of government." Sligh vs. Kirkwood, supra.

POINT FIVE.

The appellants have been accorded due process of law in the Courts of Texas.

"Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law." Corrigan vs. Buckley, 271 U. S. 327, 70 L. Ed. 973.

On the question of due process this court has up to this time "sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial and held them to be consistent with due process. * * * Without attempting to define exactly in which due process of law consists, it is sufficient to say, if the Supreme Court of a State has acted in consonance with the Constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test." Jordan vs. Massachusetts, 225 U. S. 174, 56 L. Ed. 1041. "Due process only requires that there shall be a regular course of proceeding in which notice

is given of the claim asserted." Simon vs. Craft, 182 U. S. 431-6, 45 L. Ed. 1166. "The fundamental requisite of due process is the opportunity to be heard." Grannis vs. Ordean, 234 U. S. 386; 58 L. Ed. 1368-9. "Here the State Court has decided that the proceeding below was in accordance with the laws of the State and we do not find them to be contrary to the Constitution or any law or treaty of the United States." Walker & Sauvinet, 92 U. S. 90-93, 23, L. Ed. 678. "Error of the trial judge in admitting evidence or in entering judgment after full hearing does not constitute a denial of due process of law." Jones vs. Buffalo Coal and Coke Company, 245 U. S. 328, 61 L. Ed. 325. "The plaintiff in error thus sought in the State Court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guaranties of the Constitution of the United States were denied because the litigation did not result successfully." Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. Ed. 762.

"The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to 'Deprive any person of life, liberty or property without due process of law.' And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni v. Greenhow, 107 U. S. 769 (27:468)." Cited

from F. B. York vs. State of Texas, 137 U. S. 15-21, 34 L. Ed. 607.

(See also authorities cited under Point One.)

POINT SIX.

The judgment of the courts of Texas against the American insurance companies as garnishees was rendered in full compliance with its law and jurisdiction properly and lawfully acquired over the American insurance companies, because immediately upon the total loss of the vessel a debt accrued from the re-insurance companies to the Mexican Company and this debt the appellee had a right to subject to his claim by garnishment in accordance with the laws of the State.

We are not going to undertake to answer paragraph by paragraph or decision by decision the very learned and exhaustive brief of appellants. To discuss each case would lengthen this brief to an unwarranted extent. Many cases cited by them on the question of construction of agreed limitations involve instances where the State has no statutory enactment like the one in Texas and where there is no public policy on the subject. The decisions of other courts would be wholly irrelevant and immaterial as to the case at bar because each state has a right to say what its own public policy, police power and rules of procedure shall be. These things might, or might not be considered extreme and fanciful by other courts. That, however, is not the question, the question is whether or not the State had a right to pass the statute and whether or not it has a right to construe it as it did. We also think it relevant, in view of the large number of cases cited by appellants which are not appropriate to the peculiar circumstances of this case, to suggest that the fact that this court approves a case from a state court or cites a decision from New

York for example, does not make such decision the law or relevant authority in respect to a question of practice or rule of property when passing on a case from another state. The fact that a case is affirmed does not necessarily mean that this court would have held the same thing as a matter of general or common law as is well illustrated in Pennsylvania Ry. Co. v. Hughes, supra, nor does the law so laid down, or affirmed, necessarily become the national law. The only conclusion to be drawn is that this court approves the decision of the State Court as not being contrary to the Federal constitution.

Appellants refer to the case of Travelers Insurance Company vs. Suggs, 71 Texas 579, as being relevant in this connection. That case was tried prior to the enactment of Article 5545. The law in Texas was the same as that laid down in the Riddlesbarger case, until the enactment of Article 5545. And by the way the decision in the Riddlesbarger case was one of general law upon which question the State and Federal courts have a right to differ. Each, within their own sphere and within the same State, may hold differently upon the same question. The decision in Suggs case and the decision in Armstrong vs. G. H. & S. A. Ry. Co., 92 Tex. 121, and in the case at bar, show clearly that the Supreme Court of Texas felt that it was their duty since the legislature had spoken, to follow the rule as declared by the legislature and to depart from the decisions such as the Suggs case rendered prior to the enactment of that statute.

That an agreed limitation does not extinguish a claim as a matter of general or common law, even under the decisions of this court, is fully illustrated by the case of Semmes vs. City Fire Insurance Company of Hartford, 80 U. S. 531-568, 20 L. Ed. 491, cited and relied upon by appellants. Each case is to be decided upon its peculiar facts and the law under which the case is tried.

We respectfully suggest that decision in the case at bar is no novel departure from the decisions under like statutes. The rule herein applied prevails in Alabama. Galliher vs. State Mutual Life Insurance Company, 150 Ala. 543, 124 Am. St. Rep. 83. In that case the Supreme Court of Alabama held void a contractual limitation in an insurance policy issued in Georgia. In Virginia the Supreme Court of Appeals held void a contractual limitation in a policy when said limitation was valid at the time the policy was issued. Smith vs. Northern Neck Mt. Fire Association, 112 Va. 192, 77 S. E. 483, 38 L. R. A. (N. S.) 1019. In Kansas the Supreme Court of that State held the contractual limitation in a contract issued in Pennsylvania void because in contravention of a statute like ours. Hornick v. First Catholic Slovak Union, 115 Kan. 597, 224 Pac. 486. In the latter case 7 Cooley's Brief on Law of Insurance, 1673, and 5 Joyce on Insurance, par. 3224, are both cited as sustaining the rule followed in this case. And in New York in South and Central American Commercial Company vs. Panama R. Co., 237 N. Y. 287, 142 N. E. 666, the New York Court of Appeals holds as a matter of public policy even without statutory basis, that short stipulations in foreign bills of lading are void in that State though valid where made. The rule is also sustained in 14 Ruling Case Law, 1418, par. 580, as follows:

"The limitation, by contract, of the time within which an action may be brought on an insurance policy may be, and has sometimes been, prohibited by statute, and such a statute may be applied to existing policies without impairing the obligation of the contract. Such a statute relates to the remedy, and applies to an action within the state on a foreign contract."

and also in 13 C. J. 260, it is said:

"The validity of a contract limiting the time for bringing action is governed by the law of the forum."

Not only have many States passed such legislation evidencing their public policy but Congress has seen fit to enact a similar statute with respect to clauses in bills of lading regarding the time for filing suits against transportation and railway companies engaged in interstate commerce. 49 U. S. C. A. page 75, Sec. 20, par. 11. Texas, being a border state, has had many cases decided in her courts involving contracts arising in Mexico. A good illustration is that of Banco Minero vs. Ross, 172 S. W. R. 711, where suit was originally begun by publication and writ of garnishment against bank stock in an El Paso bank belonging to the non-resident in Mexico.

We had thought that the question of jurisdiction of the American Companies was settled in the Supreme Court of Texas when it was held therein that the courts of Texas did have jurisdiction and when such holding was not assigned as error arising under the Constitution and laws of the United States (Rec. 91-92). Litigants have a perfect right to waive federal and constitutional questions, Harding vs. Illinois, 196 U. S. 82-88, 49 L. Ed. 395; Pierce Oil Co. v. Phoenix Refining Co., 259 U. S. 125, 66 L. Ed. 855; Pierce v. Summerset Ry. Co., 171 U. S. 648, 43 L. Ed. 316. We know of no better method of waiving federal questions than by failing to assign them as such in the State Courts. "That a party has taken the question of jurisdiction to a higher court is bound by its decision, was held in Forsyth vs. Hammond, 166 U. S. 506-17, 41 L. Ed. 1095-1099, 17 Sup. Ct. Rep. 665." Cited from Chicago Life Insurance Company vs. Cherry, 244 U. S. 28-30. Thus we think that the appellants are precluded by not having assigned this issue in the Supreme Court of Texas as federal error, but, if this court should disagree with us, then we suggest that there is no doubt but that the American Insurance Companies were in court by due and legal service. They do not question this. They denied that they

owed the Mexican companies anything. (Rec. 14-16). This was controverted by the plaintiff, C. J. Dick (Rec. 17-19) who set up in his controverting affidavit provided for by the garnishment laws of Texas, that each of the American companies was indebted to the Mexican company in the sum of $15,000.00. This issue was tried out and the District Court found that the two American companies were each indebted to the Mexican company in the sum of $15,000.00. This holding was based upon a long line of State cases which culminated in this court in the case of Allemannia Fire Insurance Company vs. Firemen's Insurance Company, 209 U. S. 326, 52 L. Ed. at page 815. This court has also recently affirmed the Allemannia Case, in Hicks vs. Poe, 269 U. S. 118-121, 70 L. Ed. 187 where Mr. Justice Brandeis says that such questions, that is questions involving the rights between original insurers and reinsurers, are not federal in their nature.

We think that the Supreme Court of Texas in its opinion has laid down a very clear and logical conclusion on the question of garnishment which is fully sustained by both State and Federal authorities. Garnishment is a question of remedy and is governed by statutory enactments and the decisions of the highest courts of the different states. The garnishment laws of Texas are quite liberal and a garnishment has been construed to be in the nature of a bill of discovery. The leading case on this subject is that of Phenix Insurance Company of Brooklyn vs. P. J. Willis Bros. 70 Tex. 12. In that case the court uses this language:

"But we are of opinion that the issuance of a writ of garnishment is not strictly speaking an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time. This practice is evidently contemplated by our statute of gar-

nishment. In this instance, the property having been destroyed by fire, the agreement to pay the policy was no longer contingent, but had become absolute by the happening of the event mentioned in the policy, subject to be defeated, however, by defenses pleaded and proven, as might be done in other cases of debt. Consequently the garnishment was not prematurely issued."

The Court of Civil Appeals at San Antonio, in Gordon, et al, vs. Litwood Oil & Supply Co., 261 S. W. 400, says:

"Although it had not been determined how much the insurance company owed Phillips or whether it owed anything, the writ of garnishment was not prematurely issued. As soon as the automobile was burned, the agreement to pay the policy was not a contingency, but was absolute, subject to being defeated by defenses that might have, but did not, arise. Phenix Ins. Co. v. Willis, 70 Tex. 12."

The only question for the lower courts to decide in this case, therefore, was whether or not a debt existed from the American companies (garnishees) to the Mexican company. The claim sued on was held by Supreme Court of Texas to be a liquidated demand. (Rec. 83).

Appellants suggest that there is a distinction between garnishments where the debt is admitted and where it is denied. If this were true the garnishee could by its own act of denying the liability to the original defendant defeat jurisdiction. We can see no basis for any such contention, particularly since the laws of the State provide that the answer may be controverted and issue tried. Appellants also refer to the case of Morris vs. Scandinavian Insurance Company, a case involving a question of procedure and lawful service of process in the federal courts, and wherein it is stated that there is no privity between the insured and the reinsurer. Appellees have never

claimed that there was such privity. This lack of privity was the very reason that suit was not brought directly against the reinsurers. If there had been any privity between the insured and the reinsurers we would not have brought the suit in the State court in the form of garnishment but would have proceeded directly against the reinsurers. Garnishment is a method provided by law for reaching effects in the hands of those who are not in privity with the plaintiff bringing the suit. Garnishment is intended for the purpose of reaching funds, effects and credits which could not be reached except by the roundabout method of suing the original defendant and issuing garnishment against those who owe the original defendant. Each state has a right to say just what shall be subject to garnishment and how the funds may be reached. Each state also has a right to say just how far garnishment may be used to reach funds in the hands of corporations doing business in their state and belonging to nonresidents. The garnishees are not thereby brought into privity but the plaintiff under the garnishment laws is given the right to foreclose on debts which the garnishees owe to the original defendant. These matters are so plain and fundamental that we would hardly think citation of authorities necessary. The fund found due from the reinsurers to the original insurer was foreclosed on. This is a remedy allowed by the laws of the State of Texas and on this no federal question is involved. Appellants insist that a great national question is involved in this case with respect to the rights arising between the reinsurers and the original insured. The question involved is only one of the indebtedness of one party to another and the right of the plaintiff to foreclose on same.

"It may be said to be the general rule that the right which the insured possesses against an insurance company under a policy of insurance on property is subject to gar-

nishment at the suit of creditors of the insured." 12 R. C. L. 804.

We know of no reasons, and petitioners have pointed out none, why the reinsurance companies should have any special privilege not accorded to the original insurance company and why they should not be subject to garnishment proceedings with respect to debts due by them to others. Certainly there is no inhibition in the Constitution on this subject.

Practically the same result has been reached in other jurisdictions as in this case by an assignment from the original insurer and a suit by the original insurer against the reinsurer. Consolidated Real Estate Ins. Co. v. Cashow, 41 Md. 59-78; Cass County vs. Mercantile Town Mutual Ins. Co., 188 Mo. 1, 86, S. W. R. 237. As suggested by this court in Hicks vs. Poe, supra, such questions are not federal in their nature.

It would be hard for us to believe that this court would overrule what it has held in Chicago R. I. & P. Ry. Co., vs. Sturm, supra, and approved in King vs. Cross, supra, with respect to the situs of a debt and as to the right of the creditors residing in one State, to issue garnishments on indebtedness belonging to non-residents, and to foreclose upon same through the regular course of procedure in the State Courts. Such procedure was held to be "due process of law," in spite of the fact that in the Sturm case no recovery could have been had in the domicile of the non-resident defendant because the money was exempt. In the Sturm case, Berry vs. Davis, 77 Tex. 191, was approved. That case was one where garnishment was issued against a debt due to a non-resident and the practice was approved by the Supreme Court of Texas. It is a matter of common knowledge that recoveries have often been allowed in a state or country other than the debtor's domicile, when no recovery could have been had in such

domicile because the debt was barred by limitation in the latter state. Judgment for debt can be recovered wherever jurisdiction of a party or his property or debts due him can be acquired. It is not essential that recovery could have been had in the Courts of the debtor's domicile.

WHEREFORE, appellees pray that the court consider in connection with this brief their "Answer to Statement as to Jurisdiction" and their "Answer to Petition for Writ for Certiorari" and that upon the hearing hereof that this cause be dismissed for want of jurisdiction, or in the alternative if this court should find that it has jurisdiction, that this cause be affirmed.

Respectfully submitted,

H. C. HUGHES,
JOHN NEETHE,
JOHN L. DARROUZET,
Attorneys for Appellees.